UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHANNON MARIE SMITH, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	**Case No. 1:13-cv-00420-JEB**
v.	)	
	)	
KAYA HENDERSON, *et al.*,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM IN OPPOSITION
TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Defendants District of Columbia, Chancellor Kaya Henderson, sued solely in her official capacity, and Mayor Vincent C. Gray, sued solely in his official capacity, (collectively, the "District" or "Defendants") by and through their counsel, the Office of the Attorney General for the District of Columbia, respectfully file this Memorandum in Opposition ("Opposition") to Plaintiffs' motion for a preliminary injunction, which seeks to prevent the District of Columbia Public Schools ("DCPS") from implementing its Consolidation and Reorganization Plan (the "Consolidation Plan").

PROCEDURAL BACKGROUND

On March 29, 2013, Plaintiffs filed their Complaint ([Dkt. # 1-1], at 5), Application for Temporary Restraining Order ([Dkt. # 1-1], at 21), and Motion for Preliminary Injunction ([Dkt. # 1-1], at 23) with the Superior Court of the District of Columbia. On April 2, Defendants removed this matter from Superior Court to this District Court on federal question grounds. [Dkt. # 1]. On April 3, 2013, in a conference call with this Honorable Court, Plaintiffs withdrew their Application for Temporary Restraining Order. *See* Minute Order (Boasberg, J.) (Dkt. at

Apr. 3, 2013). The Court set a briefing schedule on the Preliminary Injunction Motion and scheduled a hearing for May 10, 2013, at 11:00 a.m.

FACTUAL BACKGROUND

Prior to 1996, all District of Columbia children who attended public school were educated by DCPS, which was governed by the District of Columbia Board of Education. However, starting in 1996, an amendment to the D.C. School Reform Act of 1995 authorized the creation of Public Charter Schools. D.C. Code § 38-1800 *et seq*. Public Charter Schools are schools that are publically funded, authorized and governed by the Public Charter School Board, and are separate from DCPS. *Id.* Then, in 2007, the D.C. Council passed legislation that gave the Mayor direct authority over DCPS, and created the position of Chancellor, currently held by Defendant Henderson. D.C. Code § 38-171 *et seq*.

As Public Charter Schools were founded and became popular in the years that followed, many students went to Public Charter Schools who otherwise would have attended DCPS. At the same time, demographic changes in the District decreased the overall number of school age children, and decreased the number of children in certain neighborhoods even further. The net result of these changes was that DCPS enrollment decreased, and many individual schools' enrollments fell far below capacity.

Because of these changes, starting in late 2011, DCPS asked Education Resource Strategies ("ERS") to identify ways DCPS could become more efficient, and refocus its funds to improve education for all its students. *See* August 17, 2012, Memorandum Re: Summary of Resource Allocation Opportunities in DCPS, attached as **Exhibit A**, at 1. ERS studied DCPS for almost a year, and on August 17, 2012, reported its findings to DCPS Chancellor Henderson. *Id.* ERS identified more than $100 million in potential savings that could result from various

measures. *See generally*, Exhibit A. ERS' first recommendation, amounting to almost $22 million in direct potential savings, was for DCPS to "consolidate small schools to enable more strategic use of school-level resources and to free resources … for strategies better aligned with student need." Exhibit A, at 2. Because DCPS spends more money per student in small schools than in larger schools, such consolidation naturally results in greater efficiency. *Id.* at 3. Further, ERS concluded the cost savings from consolidation could be reinvested back into other priorities, actually improving the quality of education for all students. *Id.* ERS also determined that small school size was *hurting* the ability of teachers to adequately address the needs of DCPS students. *Id.* at 2-3. Not only is it very difficult to fund full-time specialized staff at small schools (teachers for art, music, and physical education; librarians, etc.) but *even the core teachers cannot effectively network and collaborate to maximize the effectiveness of their lessons*. *Id.* The latter problem is especially acute where a small elementary school has only one home-room teacher per grade level, or a small middle/high school has only one or two teachers in a focus area like math or science. *Id.*

In addition to the education improvements and direct savings, a significant number of the other DCPS service enhancements suggested by ERS were partially dependent upon consolidating smaller schools. *See generally*, Exhibit A (indicating, *inter alia*, that DCPS problems with: 1) too many non-teacher full-time employees per student; 2) inability to match class sizes to teacher ability; and 3) inability to focus resources on core classes as opposed to electives, were all partially the result of having too many small schools).

Armed primarily with the information from ERS, along with other relevant studies and information, DCPS prepared a preliminary Consolidation Plan to consolidate twenty under-enrolled schools and released that plan to the public in November 2012. *See* "DCPS

Consolidation and Reorganization: Better Schools for All Students," attached as **Exhibit B**. In addition to summarizing the rationales behind each of the proposed changes, DCPS also informed the public of a series of *six public meetings* that would take place in November and December, 2012, to discuss the plan. *Id.* at 4. This series included two Council meetings at the Wilson Building, a Ward-specific meeting for each of Wards 5, 7, and 8—the Wards most affected by the changes—and another meeting for the remaining Wards. *Id.* Exhibit B itself was posted on the DCPS website; distributed to the principals of all DCPS schools; e-mailed to every Advisory Neighborhood Commissioner ("ANC"); posted to all Parent Teacher Association listservs; and *physically sent home in the backpacks of every single child who went to a school that was potentially impacted by the plan*. *See* Declaration of Peter Weber, attached as **Exhibit C**, ¶¶ 7-13.

This extensive notice to the community generated an equally extensive response. *Nearly eight-hundred* members of the public attended the Ward-based community meetings (Wards 1-4, 6: 248 attendees; Ward 5: 132 attendees; Ward 7: 233 attendees; Ward 8: 169 attendees). *See* "Better Schools for All Students: DCPS' Consolidation and Reorganization Plan," attached as **Exhibit D**, at 4. In addition to the Council Hearings and the Ward meetings, DCPS also met with ANCs; D.C. Council members; major nonprofit and corporate partners of affected schools; members of the faith community; Parent Teacher Associations, members of the Board of Education; the State Advisory Board on Special Education; the United States Department of Education; and the unions for teachers and other staff members. *Id.* In response to this dialogue, DCPS changed the details of its preliminary plan for 10 of the 20 schools. *Id.* at 6-7. DCPS even agreed to keep open five of the schools it had slated for closure in the preliminary plan. *Id.*

The input of the public helped DCPS to tailor its final Consolidation Plan to maximize the benefit to the entire DCPS system, and minimize the effects on individual students and parents.

However, after considering the opinions of all the stakeholders consulted, and evaluating all the evidence, it was still obvious to DCPS that closing some schools was necessary to improve education for those schools' individual students, and the entire city. *Id.* at 2. These improvements will be made, in part, by taking approximately $8.5 million in savings from closing the fifteen remaining schools, and applying it to additional elective and enrichment programs for all DCPS students. *Id.* at 9. In sum, the Consolidation Plan is the result of legal and demographic changes outside the control of DCPS, years of research by DCPS, months of feedback from the community, and will result in millions of dollars in savings *while improving education for all students in DCPS*.

Plaintiffs are five individuals who either are guardians of children who attend three of the schools scheduled for closure under the Consolidation Plan or Advisory Neighborhood Commissioners of districts where schools are scheduled for closure. [Dkt. # 1-1], at 6-7. Not content either with the extensive community outreach, described above, or the ability to express their displeasure in the political sphere, Plaintiffs, instead, filed this lawsuit. Having failed to sway the public debate, Plaintiffs now attempt to force their will on DCPS and the public at large. Despite the extensive findings made as to the inefficiencies in continuing to maintain small, under-enrolled schools and the substantial cost savings from closure and consolidation that will inure to the benefit of all DCPS students, these five individuals now ask the Court for a preliminary injunction to stop the District from implementing the Consolidation Plan.

PLAINTIFFS LACK STANDING

Before even reaching the question of whether a preliminary injunction of the Consolidation Plan is legally appropriate, this Court should note that Plaintiffs have no standing to request that relief. This is not a class action.[1] As noted above, Plaintiffs fall into one of two categories. Shannon Marie Smith, Marlece Turner, and Brenda Williams (the "Guardians") are the guardians of children whose schools would be consolidated under the final Consolidation Plan. [Dkt. # 1-1], at 6-7. Plaintiffs Karlene Armistead and Ericka S. Black (the "ANC Plaintiffs") are Advisory Neighborhood Commissioners (ANCs) of Wards 8C and 7D, respectively. The Guardians' children attend just three of the fifteen schools scheduled for closure: Ferebee-Hope E.S., MacFarland M.S., and Sharpe Health. [Dkt. # 1-1], at 63-72. For the ANC Plaintiffs, only six of the fifteen schools scheduled to be closed serve Wards 7 and 8.[2] Exhibit D. Together, all Plaintiffs are associated with, *at most,* seven out of the fifteen schools to be closed under the final Consolidation Plan. Yet even though they are connected to *less than half* of the schools scheduled for closure, Plaintiffs ask the Court to enjoin the implementation of *the entire Consolidation Plan*. [Dkt. # 1-1], at 75-76. This request is contrary to law.

"Standing is one of the essential prerequisites to jurisdiction under Article III" of the U.S. Constitution. *Renal Physicians Ass'n v. Dept. of Health & Human Servs.*, 422 F. Supp. 2d 75, 81 (D.D.C. 2006) (citing *Crow Creek Sioux Tribe v. Brownlee*, 331 F.3d 912, 915 (D.C. Cir. 2003)). Standing serves to define, and to limit, the role of the judiciary, and to ensure that the

[1] Plaintiffs' counsel admitted as much to the Court during a phone conference on April 3, 2013.

[2] Whether or not they have standing regarding the schools in their Wards, it is self-evident that the ANC Plaintiffs have none whatsoever with respect to schools outside their Wards. D.C. Code § 1-309.10(a) ("Each Advisory Neighborhood Commission ("Commission") may advise . . . the government of the District of Columbia with respect to all proposed matters of District government policy . . . which *affect that Commission area*.") (emphasis supplied).

courthouse doors are not opened to issues and grievances the resolution of which properly is entrusted to the political branches of government. *See generally Warth v. Seldin*, 422 U.S. 490, 500 (1975); *see also Florida Audubon Soc. v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996) (en banc) (noting that the standing doctrine serves to assure that "the judiciary is the proper branch of government to hear the dispute"); *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009) (noting that allowing courts to oversee legislative and executive action where the elements of standing have not been met would "significantly alter the allocation of power . . . away from a democratic form of government") (internal citation omitted). In order to have standing, a plaintiff "must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (internal citations omitted). Further, a plaintiff "cannot rest his claim on the rights or interests of third parties" or assert a harm that is a generalized grievance "shared in substantially equal measure by all or a large class of citizens." *Warth*, 422 U.S. at 499. *See Fair Empl. Council of Greater Wash., Inc. v. BMC Mkt. Corp.*, 28 F.3d 1268, 1273 (D.C. Cir. 1994) (noting that plaintiffs' reference to "third parties . . . does not help [] establish standing; to satisfy the requirements of Article III, they must allege that they themselves are likely to suffer future injury") (citing *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983)).

Plaintiffs have no injury with respect to schools they do not attend and, therefore, no standing. *Lujan*, 504 U.S. at 560-561. To grant Plaintiffs a preliminary injunction against the entire Consolidation Plan would be inappropriate, and would allow them to rest their claims on the interests of third parties—namely the children attending the other eight schools scheduled for closure. *Warth*, 422 U.S. at 499. Likewise the standing of the ANC Plaintiffs *in its entirety* is

based inappropriately on the rights of third parties. *Id.* There is no right to have a certain number of schools operating in the Ward that one serves as an Advisory Neighborhood Commissioner, so the ANC Plaintiffs must be attempting to sue based on the interests of the children who attend those schools, or those children's parents.[3] Neither endeavor is appropriate. *Id.*

Plaintiffs, at best, have standing only to contest DCPS' Consolidation Plan with respect to Ferebee-Hope E.S., MacFarland M.S., and Sharpe Health. This Court should not consider issuing an injunction that affects more than these three schools. *Warth*, 422 U.S. at 499. Furthermore, as explained below, even as to these three schools, Plaintiffs' request for a preliminary injunction fails, and their motion should be denied.

LEGAL STANDARD FOR A PRELIMINARY INJUNCTION

Emergency injunctive relief is an "extraordinary and drastic remedy," which should not be granted unless the movant carries its burden of persuasion "by a clear showing." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). *See also Monsanto Co. v. Geertson Seed Farms*, ___ U.S. ___, 130 S.Ct. 2743, 2761 (Jun. 21, 2010) ("An injunction is a drastic and extraordinary remedy,

[3] The ANC Plaintiffs will likely argue that their standing is based on the right to *receive notice and have their opinions considered* before the closure of the schools in their Wards. [Dkt. # 1-1], at 14. But, while this *might* give them standing for an affirmative injunction *forcing the District to give them notice, or to consider their opinions*, it would *not* convey standing to enjoin *the closure of the schools*. Notably, plaintiffs' own cited authority demonstrates that the remedy for failure to give "great weight" to ANC advice is remand to the agency to "reissue a decision with explicit reference to each ANC issue and concern as such, as well as specific findings and conclusions with respect to each." *Kopff v. District of Columbia*, 381 A.2d 1372, 1384 (D.C. 1977). Further, ANC Plaintiffs would not even be entitled to this remedy, given the extensive community outreach here. Actual reversal of the agency decision is an inappropriate remedy, especially where, as here, even ANC Plaintiffs admit that DCPS was not required to show "special deference" to ANC opinions or to act consistently with them. [Dkt. # 1-1], at 39, quoting *Committee for Washington's Riverfront Parks v. Thompson*, 451 A.2d 1177 (D.C. 1982).

which should not be granted as a matter of course."); *In re Antioch Univ.*, 418 A.2d 105, 109 (D.C. 1980) ("Injunctive relief is extraordinary relief and will not be granted lightly.").

Plaintiffs must produce persuasive evidence that: 1) there is a substantial likelihood of success on the merits of their claim; 2) they would suffer irreparable injury if the injunction is not granted; 3) defendants would not be substantially injured by the injunction; and 4) the injunction is in the public interest. *Holiday CVS, L.L.C. v. Holder*, 839 F.Supp.2d 145, 157 (D.D.C. 2012); *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 376 (2008); *Katz v. Georgetown Univ.*, 246 F.2d 685, 687-88 (D.C. Cir. 2001); *Mova Pharmaceuticals Corp. v. Shalala*, 140 F.3d 1060, 1066 (D.C. Cir. 1998). These four factors are interrelated, and must be balanced against each other.[4] *Serono Labs. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998). Because the analysis of these factors weighs heavily in favor of the District as set forth below, the preliminary injunction should be denied.

ARGUMENT

I. Plaintiffs Are Unlikely to Succeed on the Merits.

Plaintiffs allege that the District has failed to give ANCs notice under D.C. Code § 309.10 and that the Consolidation Plan violates their civil rights under the following statutes: the Americans with Disabilities Act (42 U.S.C. § 12132) ("ADA"); the Individuals with Disabilities in Education Act ("IDEA"); Section 504 of the Rehabilitation Act of 1973 ("Section 504"); Title VI of the Civil Rights Act (42 U.S.C. §§ 2000d *et seq.*); the Equal Protection Clause of the Fourteenth Amendment

[4] As this Court notes in a prior ruling, this Circuit has suggested, without deciding, that the balancing analysis, commonly referred to as evaluating the four-part test on a "sliding scale" should be abandoned in favor of a "more demanding burden" that *requires* Plaintiffs to independently demonstrate both a likelihood of success on the merits and irreparable harm. *See Henke v. Department of the Interior*, 842 F.Supp.2d 54, 58-59 (D.D.C. 2012) (citing *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011) and *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009)). However, because Plaintiffs cannot meet *either* burden, their request for an injunction should be denied.

(applied to the District of Columbia via the Fifth Amendment, and raised pursuant to 42 U.S.C § 1983); and the District of Columbia Human Rights Act ("DCHRA") (D.C. Stat Ann. §§ 2-1402.73; 2-1402.68; 2-1402.41). [Dkt. # 1-1], at 37-44. As set forth below, none of these claims are likely to succeed on the merits.

A. Plaintiffs' Claims Concerning the ANCs and Public Decision Making Are Unlikely to Succeed.

1. DCPS Gave the ANCs and the Public Sufficient Notice.

Plaintiffs' allegation that DCPS failed to give notice to the appropriate ANCs, or weight to those ANC opinions is unlikely to succeed on the merits.[5] First, beyond the conclusory allegation that "[i]n the instant case, no notice was given to the subject ANCs" the Plaintiffs offer no support for their contention that notice was not given. [Dkt. # 1-1], at 14. Further, as set out above, DCPS gave extensive notice to all members of the public including; six public hearings, extensive electronic distribution—with e-mails directly to every ANC—and physical distribution in the backpack of *every affected child*. Exhibit C, ¶¶ 4-13. To the extent Plaintiffs are arguing that they did not receive written notice by mail (*see* D.C. Code § 1-309.10(b)),[6] the case law is clear that *actual notice* is sufficient. *See Kopff v. District of Columbia Alcoholic Beverage Control Board*, 381 A.2d 1372, 1382 (D.C. 1977) (error in failure to give statutory notice to ANC was cured by giving actual notice); *Shiflett v. District of Columbia Bd. of Appeals and Review*, 431 A.2d 9, 11 (D.C. 1981) (failure to notify an ANC regarding an application for a building permit was harmless

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[5] The District does not concede that the Consolidation Plan is necessarily the sort of District policy where DCPS would be *legally required* to give notice to the ANCs. *See* D.C. Code § 1-309.10. But such a question is largely academic where, as here, DCPS did, in fact, give extensive notice to the ANCs and the entire public.

[6] Such a contention truly elevates form over substance, as DCPS gave every ANC actual *written* notice by *electronic mail*, more than *sixty days* in advance of the final Consolidation Plan. *See* Exhibit C, ¶¶ 4-13.

error where ANC received actual notice). Here, Plaintiffs are unlikely to succeed on any claim based on notice because they present only conclusory allegations in the face of the indisputable barrage of actual notice that was given by DCPS. Exhibit C, ¶¶ 4-13.

2. DCPS Did Accord Due Weight to the All Citizen Concerns about the Consolidation Plan.

The ANC Plaintiffs appear to claim that the only reason the District failed to give their concerns "great weight" was because DCPS also failed to give them notice of the Consolidation Plan. [Dkt. # 1-1], at 14. But, as explained above, any claim about lack of notice fails because DCPS gave actual notice to all ANCs, including the ANC Plaintiffs, and that is sufficient under the case law. *Kopff*, 381 A.2d at 1382.

Aside from claiming that they did not receive notice, the ANC Plaintiffs have not shown they gave any advice or recommendations about the Consolidation Plan.[7] Advice and recommendations by ANCs "shall be in writing" and articulate a basis for their decisions. D.C. Code § 1-309.10(d)(1). To show *any* likelihood of success on a claim that DCPS failed to give great weight to their advice or recommendations, the ANC Plaintiffs must, at the very least, demonstrate that they gave written recommendations to DCPS. There is no such evidence on this record.

But, more importantly, it is obvious that DCPS gave the ANCs' comments, and all public feedback, the required weight. Exhibit D, at 2 ("[w]e took all the feedback that we heard very seriously. … We met with ANC members…"). The Consolidation Plan was *drastically altered* as a direct result of public feedback. *Compare* Exhibit B, at 16, with Exhibit D, at 6-7. Notably, the original plan proposes consolidating twenty schools, while the final plan leaves five of those schools

[7] Further, to the extent the ANC Plaintiffs claim they gave advice or recommendations, they must concede that they had actual notice of the Consolidation Plan.

open (Francis Stevens Education Campus,[8] Garrison E.S., Smothers E.S., Johnson M.S., and Malcolm X E.S.). *Id.* Three out of five of the schools that were chosen to remain open as a result of public feedback were in Wards 7 and 8, the wards represented by the ANC Plaintiffs. Other than the five schools chosen to remain open, major changes were made to the Consolidation Plan for an additional five schools (for example, changing what school they would be consolidated into) (MacFarland M.S., Davis E.S., Kenilworth, E.S., Winston Education Campus, and Choice at Hamilton Special Education Program). *Id.* Three out of these five schools serve Ward 7. *Id.* This means that after considering public feedback, DCPS altered its preliminary plans *for two-thirds* of the nine schools initially scheduled for closure in Wards 7 and 8. *Id.* In light of this undisputed factual record, the idea that DCPS did not give "great weight" to public opinion—including that of the ANC Plaintiffs—is pure fantasy.

For these reasons, the ANC notice claim is not likely to succeed on the merits and, thus, does not support a preliminary injunction.

3. Plaintiffs' Claims that DCPS Violated the "Sunshine Act" are Both Legally Insufficient and Facially Invalid.

Plaintiffs claim that some aspect of the Consolidation Plan does not comply with Public Law 93-198, Title VII, Section 742, colloquially known as the "Sunshine Act." This statute is currently codified (and will be referred to hereinafter) as D.C. Code § 1-207.42. Plaintiffs make no attempt to actually articulate this claim other than alleging that "[t]he decisions regarding the school closures were done in the dark." [Dkt. # 1-1], at 14. As an initial matter, this sort of conclusory allegation cannot even state a claim, let alone have a likelihood of success. *See Iqbal v. Twombly*,

[8] Francis Stevens Education Campus will remain open and its students will stay in the same location, but it will be administratively merged into School Without Walls. Exhibit D, at 6.

556 U.S. 662, 678 (2009) ("The Court is not bound to accept as true a legal conclusion couched as a factual allegation.") (internal quotations omitted).

Furthermore, the facts recited above make clear that these decisions were carried out in the glaring light of public scrutiny. DCPS released the initial Consolidation Plan in November of 2012. Exhibit B. Then DCPS held six public hearings, including two full Council hearings and four Ward-specific hearings. *Id.* *Hundreds of people* attended these meetings. Exhibit D, at 4. DCPS sent information about the Consolidation Plan and the public hearings to every student in an affected school, every principal in the DCPS system, every ANC, and every known listserv or electronic contact. *See* Exhibit C, ¶¶ 4-13. DCPS also informed, and continues to inform, the public of its decision-making via the Internet. *Id.* All the reasoning behind the Chancellor's decision is set out in the final Consolidation Plan. *See generally*, Exhibit D. It is not clear what more could be illuminated here, and Plaintiffs have certainly not demonstrated they have a likelihood of proving that this massive outreach and distribution of information to the community constitutes, paradoxically, a lack of transparency.[9]

B. Plaintiffs are Unlikely to Succeed on Their Civil Rights Claims, and Therefore, They Do Not Support a Preliminary Injunction.

Plaintiffs' "kitchen-sink" civil rights claims are without merit. First, this Court lacks subject matter jurisdiction where Plaintiffs have failed to show they exhausted (or even initiated, for that

[9] To put it another way, where the Chancellor announced her intended decision and the reasoning behind it publically, accepted extensive feedback via multiple public hearings and correspondence, and then revised her decision as a direct result of such outreach, there is no purpose to hewing to the pedantic requirement that *another* hearing be held just to make that decision conform to any purported transparency requirement. In a sense, the entire two months between the publication of the initial Consolidation Plan and the release of the final Consolidation Plan were a long and complex public hearing that fully satisfies the requirements of D.C. Code § 1-207.42.

matter) any administrative procedures for their ADA, IDEA, Section 504, and Title VI claims.[10] Second, the ADA, IDEA, Section 504, and DCHRA claims fail for the straightforward reason that no DCPS student (including Plaintiffs' children) will be denied, excluded from, or otherwise restricted in accessing their full public education rights. Plaintiffs' § 1983 equal protection claim fails because they were neither targeted as a protected class, nor treated differently than others similarly situated. Finally, Plaintiffs' Title VI and equal protection claims are unlikely to succeed because there is no intent to discriminate against any protected class.

1. Plaintiffs' IDEA, Section 504, ADA and Title VI Claims Fail Because They Did Not Exhaust Administrative Remedies.

As explained at the start of this memorandum, Plaintiffs' standing in this case is already tenuous since they have little or no connection to most of the schools closed under the Consolidation Plan. In addition, for Plaintiffs' IDEA, Section 504, ADA and Title VI claims, this Court lacks Article III jurisdiction because of their failure to exhaust administrative remedies.

The IDEA *specifically forbids* the filing of a lawsuit under the IDEA, Section 504, and the ADA without first exhausting the IDEA's administrative procedures, as follows:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 791 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

[10] Upon information and belief, Plaintiff Shannon Smith did file initial paperwork with the D.C. Office of Human Rights on or about January 23, 2013, but never attended the required follow-up interview to actually lodge her claim, and completely abandoned the administrative process by mid-February.

20 U.S.C. § 1415(l); *see also id.* § 1415(f)(1)(A) (providing for an administrative due process hearing at the request of a parent or guardian challenging a special education placement or manifestation decision). Likewise, in this context Plaintiffs must exhaust administrative remedies before bringing a Title VI claim. *Abrahamson v. Bennett*, 707 F.Supp. 13, 15-16 (D.D.C. 1989) (private litigant could not enjoin an allegedly discriminatory school system under Title VI because even the Federal government could not do so without following administrative procedures and it was "inconceivable" that Congress intended individuals to be able to circumvent this system). Exhaustion of administrative remedies is important because:

> (1) even if the agency below "cannot resolve the problem finally, the record made in the administrative proceeding will be extremely helpful to the court, since the administrative agency will likely have probed the issue with more expertise than a federal court could bring;" and (2) the administrative process affords "a means whereby official abuse can be corrected without resort to lengthy and costly trial."

Henneghan v. Dist. of Columbia, No. 2007-CV-0217, slip op. at 13 (D.D.C. Apr. 16, 2013) ("2013 *Henneghan* Slip Op." attached hereto as **Exhibit E**) (citing *Douglass v. Dist. of Columbia*, 750 F. Supp. 2d 54, 60 (D.D.C. 2010) (quoting *Cox*, 878 F.2d at 419)).

Absent proper exhaustion of administrative remedies, Plaintiffs cannot be said to have an "injury" for Article III standing purposes and, thus, their non-exhaustion of administrative remedies is fatal to their IDEA, Section 504, ADA, and Title VI claims. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (requiring that plaintiffs show that they "have suffered an 'injury in fact' – an invasion of a legally protected interest); 2013 *Henneghan* Slip Op. at 14 (Court finding that it lacked subject matter jurisdiction over IDEA, Section 504, and ADA claims

where the plaintiffs failed to exhaust their administrative remedies prior to bringing suit under the IDEA, 504, or ADA).[11]

Plaintiffs have utterly failed to plead the requisite exhaustion here. *See generally,* [Dkt. # 1-1], at 5-17; *see* also *id*. at [Dkt. # 1-1], at 66-67 (Plaintiff Turner, parent of McFarland Middle School student, alleging that her son is covered by a 504 plan for "ADHD and Asperger's" but failing to allege the exhaustion of any administrative remedies), at 70-71 (Plaintiff Williams, parent of Sharpe Health Elementary School student, alleging that she "was given no notice of the closure, and no meaningful opportunity for a hearing" but failing to allege exhaustion of administrative remedies).

As the *Henneghan* Court explained, this glaring deficiency dooms Plaintiffs' IDEA, Section 504, and ADA claims to inevitable failure. 2013 *Henneghan* Slip Op. at 13 (citing *Cox v. Jenkins,* 878 F.2d 414 (D.C. Cir. 1989). Likewise, *Bennett* demonstrates that Plaintiffs' Title VI claim is similarly infirm. 707 F.Supp. at 15-16. Thus, these legally deficient claims cannot support Plaintiffs' motion for a preliminary injunction.

2. Plaintiffs Plead no Actionable "Exclusion" or "Denial" of their Public Education Rights under IDEA, Section 504, ADA, or DCHRA.

Plaintiffs predicate much of their plea for injunctive relief upon bare assertions that two Plaintiffs have children with special needs whose rights to be properly accommodated in the school setting will be abridged by the Consolidation Plan. But, Plaintiffs' Section 504, IDEA, ADA, and DCHRA claims fail for the straightforward reason that the Consolidation Plan does not *deprive,*

[11] The *Henneghan* Court rejected the plaintiffs' invitation to follow other circuits' positions that the exhaustion requirement is not jurisdictional, noting specifically that "no Court in this Circuit" has concluded "that the IDEA's exhaustion requirement is not jurisdictional." For purposes of this Opposition, however, whether the exhaustion requirement goes to jurisdiction or to the merits of Plaintiffs' claims is merely academic. Either way, the indisputable failure of Plaintiffs to exhaust their administrative remedies bars any finding that they are likely to succeed on the merits of these claims.

exclude, restrict, or otherwise limit any student's access to a Free Appropriate Public Education ("FAPE") in DCPS. Indeed, Plaintiffs fail to even plead such factual averments. Thus, there is no likelihood that Plaintiffs will actually succeed on the merits of any of these claims.

The *sine qua non* of a valid claim under any of these four civil rights statutes is some kind of "denial," "exclusion," or "restriction" of a public education. *See* 20 U.S.C. § 1400(d)(1) (IDEA's requirement that schools provide each eligible child with a free, appropriate public education) [12]; 29 U.S.C. § 794(a) (Section 504 of the Rehabilitation Act providing that "[n]o otherwise qualified individual with a disability in the United States … shall, solely by reason of her or his disability, *be excluded* from the participation in, *be denied* the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance …) (emphasis supplied); 42. U.S.C. § 12132 (Title II of the ADA providing that "no qualified individual with a disability shall, by reason of such disability, *be excluded from participation in or be denied the benefits*" of public services (emphasis supplied); D.C. Code § 1-2520 (DCHRA providing that it shall be an unlawful discriminatory practice for an educational institution to "*deny, restrict, or to abridge or condition* the use of, or access to, any of its facilities and services to any person otherwise qualified, wholly or partially, for a discriminatory reason . . ." (emphasis supplied); *see also Henneghan* Slip Op. at 4-5 (Exhibit E) (providing an overview of the "interplay" between Title II of the ADA, Section 504, and IDEA).

Despite their colorful, accusatory assertions that the Consolidation Plan abridges students' special education rights, Plaintiffs plead no factual basis for any actionable "exclusion" sufficient to state a claim under the IDEA, Section 504, the ADA, or DCHRA. *See Ashcroft v.*

[12] While the IDEA's *statutory* language is not phrased in terms of "exclusion," that term is present in IDEA's regulatory scheme. *See* 34 C.F.R. § 104.33(d) (prohibiting the "*exclu[sion] of any qualified handicapped person* from a public elementary or secondary education") (emphasis supplied).

Iqbal, 556 U.S. 662, 678 (2009) (holding that for motion to dismiss purposes, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation") (internal quotations omitted). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id*. at 678 (quoting *Bell Atlantic. Corp. v. Twombly*, 550 U.S. 544, 5567 (2007)) (internal quotations omitted). Here, the principles of *Iqbal* and *Twombly* require that Plaintiffs plead facts of some kind of exclusion or denial of a FAPE, as this is a threshold matter for a *prima facie* claim under these statutes. If they cannot even plead the predicates for a claim, they are certainly not likely to succeed for the purposes of a preliminary injunction.

The most generous interpretation of Plaintiffs' complaint and supporting affidavits is that the Court should simply infer that a *change of school location* is tantamount to a deprivation of services or accommodations under federal disability law. But, as explained further below, receiving the same education in a different place is not an actionable harm for the purposes of an injunction, let alone the more specific deprivation required by the IDEA, Section 504, ADA, and DCHRA. Plaintiffs' conclusory allegation that the "receiving" schools would not provide the accommodations to which they are entitled is merely conjectural. *See generally*, [Dkt. # 1-1]. The District acknowledges that changing a student's school (whether due to the Consolidation Plan at issue here, or for any other reason) can certainly cause inconvenience to students and their families. Indeed, the District has addressed this concern by providing *nine months* of advance notice of the school closures and working with families and the community to ameliorate transportation issues. *See* Exhibit B. But the District is aware of no case law (nor have Plaintiffs cited any) that supports Plaintiffs' implicit (and untenable) assertion that a mere

change of a student's school location amounts to an actionable deprivation of rights under IDEA, Section 504, ADA, or DCHRA.

In other words, Plaintiffs have no grounds to argue that DCPS must continue to educate their children precisely in the exact same schools they currently attend. In the glaring absence of any factual allegations that Plaintiffs' children will be denied a FAPE or otherwise excluded from a public education, these claims will not survive dispositive briefing, let alone succeed on the merits. Thus, Plaintiffs certainly cannot obtain the extraordinary relief of a preliminary injunction based on alleged violations of the IDEA, Section 504, ADA, or DCHRA.

C. Plaintiffs' Section 1983 Equal Protection Claim Fails Because They Were Neither Targeted Because of Membership in a Protected Class Nor Treated Differently Than Others Similarly Situated and There Is a Rational Basis For the Consolidation Plan.

Plaintiffs' only alleged basis for Section 1983 liability is that the Consolidation Plan "denies students of color, those with disabilities and those residing in low income neighborhoods equal protection in violation of the United States Constitution." [Dkt. # 1-1], at 18. The equal protection principles embodied in the Due Process Clause of the Fifth Amendment[13] direct that similarly situated persons be treated alike. *Kelley v. District of Columbia*, 893 F.Supp.2d 115, 122 (D.D.C. 2012). Plaintiffs can show this one of two ways: either they must demonstrate they were treated differently because of membership in a protected class, or they must show they were treated differently from others who are similarly situated without a rational basis. *Id.* Plaintiffs show neither, and so their Section 1983 equal protection claim will not succeed on the merits.

[13] The Fourteenth Amendment applies only to states. *Bolling v. Sharpe*, 347 U.S. 497, 499, (1954). The Fifth Amendment applies to the District of Columbia, and is an independent source of equal protection rights. *Id.*

1. Disparate Impact Alone Does Not Demonstrate that Plaintiffs Were Targeted Because They Are In any Protected Class.

First, the Consolidation Plan on its face does not target Plaintiffs because of their membership in a protected class.[14] The Consolidation Plan targets under-enrolled schools. *See generally*, Exhibits B and D. Plaintiffs already admit that the Consolidation Plan, in fact, affects students of a variety of races (African American, Hispanic, Caucasian, and "Asian/Other/unknown"). [Dkt. # 1-1], at 51-52. Likewise, they concede it affects both students who are low income, and those who are not; and that it affects both students with special needs, and those without.[15] *Id.*

Indeed, plaintiffs apparently do not even attempt to prove that they were expressly targeted as members of a protected class, and instead base their equal protection claim on the disparate impact of the Consolidation Plan. [Dkt. # 1-1], at 10-13. But, disparate impact alone is not sufficient to establish a violation of equal protection. *Washington v. Davis*, 426 U.S. 229, 242, (1976) (holding it was error to invalidate statute under Fifth Amendment equal protection analysis where there was no evidence presented other than disparate impact).

Plaintiffs here offer nothing, other than a supposed disparate impact of the Consolidation Plan on African-American children, to establish a violation of equal protection. Indeed, other than the supposed defective notice to ANCs while promulgating the Consolidation Plan, Plaintiffs have literally alleged no other actions by the defendants that might establish an equal protection violation other than the Consolidation Plan itself. *See generally*, [Dkt. # 1-1].

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[14] Indeed, it does not target the Guardian Plaintiffs directly, although it does affect their children. And it does not target or affect the ANC Plaintiffs at all, given that neither of them is of school age.

[15] Plaintiffs offer no authority that either low-income communities or individuals living "east of the park" constitute a protected class for the purposes of equal protection.

2. Plaintiffs Were Not Treated Differently than Others Similarly Situated and the Consolidation Plan Has a Rational Basis.

Because Plaintiffs cannot show they were targeted because of their race, they must instead show that the Consolidation Plan treated them differently from others who were similarly situated without a rational basis. *See Hedgepeth ex rel. Hedgepeth v. Washington Metrop. Area Transit Authority*, 386 F.3d 1148, 1153-54 (D.C. Cir. 2004) (noting that "[u]nder rational basis review, a classification need only be rationally related to a legitimate governmental interest."); *Kelley*, 895 F.Supp.2d, at 115. But Plaintiffs cannot show they were treated differently than others similarly situated, or that the Consolidation Plan is irrational.

a. Plaintiffs Analysis Does Not Compare Their Treatment with Similarly Situated Individuals, and is Otherwise Flawed.

Plaintiffs' evidence that supposedly shows them treated differently than other similarly situated individuals is fatally flawed. They present an affidavit that appears to be a statistical analysis comparing the racial and disability composition of the schools to be closed under the Consolidation Plan with all DCPS schools. [Dkt. # 1-1], at 49-52. First, the District has not had a chance to examine or depose this witness, and so the Court should consider that fuller discovery may bring hidden problems with this testimony to light.[16] But even a cursory inspection of Plaintiffs' proffer reveals numerous faults.[17]

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[16] Even so, the District does not believe an expedited deposition of any of Plaintiffs' witnesses, without the benefit of initial disclosures or a discovery plan, would be helpful at this time or is necessary for a decision on this motion.

[17] Two obvious faults of this proffer, other than Plaintiffs below-discussed comparison of unlike schools, are that Plaintiffs' affiant concerning disparate impact 1) is a lay attorney, without any credentials that would qualify her to conduct the opinion analysis contained in her affidavit, and 2) relies extensively on "the Chancellor's own recent […] data," without revealing this data or any way to verify its alleged source. To the extent Plaintiffs are actually relying on a DCPS document containing this data, it would likely be an admissible business record, and ought to be filed with the Court. If Plaintiffs have admissible evidence in support of their claims, they must present that evidence, not conclusory affidavits that do not reveal their source material.

Chief among these faults is the fact that it is simply inappropriate to compare the racial and disability compositions of the schools scheduled for closure under the Consolidation Plan to the racial and disability compositions of DCPS as a whole. This is because the schools scheduled for closure and those being kept open *are not similarly situated*. *See generally*, Exhibit B and D. The entire point of the Consolidation Plan is to close schools that are *distinctly different* from other DCPS schools: generally those that are under-enrolled, are in areas with less anticipated student growth, and have not been recently renovated. Exhibit B, at 15. Plaintiffs have not alleged or demonstrated that there are other under-enrolled, un-renovated schools in low growth areas that are being kept open contrary to their equal protection rights. Comparison of the racial makeup of the schools scheduled for closure with DCPS as a whole is meaningless.

For this reason Plaintiffs cannot show that they were treated differently from others who were similarly situated, and their equal protection claim fails.

b. The Consolidation Plan has a Rational Basis, and Will Likely Be Upheld for that Reason.

But even if Plaintiffs could make some showing of different treatment, they still are unlikely to succeed on the merits of their equal protection claim because the Consolidation Plan has a rational basis. *See Armour v. City of Indianapolis*, __ U.S. __, 132 S.Ct. 2073, 2079-80 (2012) (citing, *inter alia*, *Heller v. Doe*, 509 U.S. 312, 319–320 (1993)). This Court has long held that "a classification neither involving fundamental rights nor proceeding along suspect lines ... cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." "[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Dixon v. District of*

Columbia 666 F.3d 1337, 1342 (D.C. Cir 2011) (quoting *Romer v. Evans*, 517 U.S. 620, 631 (1996) (citation omitted)).

As set out in some detail above, the Consolidation Plan is designed upon several rational bases: to consolidate schools that are under enrolled, to decrease money spent on maintenance of school buildings, to allow teachers to network more effectively, to allow more students to have access to librarians and elective classes, and otherwise to improve education for all students. *See generally*, Exhibits B and D. These are legitimate ends and more than satisfy the rational basis test.[18] Accordingly, Plaintiffs have not demonstrated a likelihood of success on their Section 1983 claim.

D. Plaintiffs Cannot Show Discriminatory Intent, So Both their Equal Protection and Title VI Claims Fail.

In addition to a disparate impact, to prevail on their Equal Protection and Title VI claims, the Plaintiffs must also show that the District acted with discriminatory intent. Because plaintiffs cannot make this showing, neither of these claims is likely to succeed on the merits, and their motion for a preliminary injunction should be denied.

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[18] Moreover, these types of inherently discretionary decisions are uniquely the province of the Mayor. For example, the Mayor (as delegated here to the Chancellor) shall "govern the public schools in the District of Columbia" and have "authority over ***all*** curricula, operations, functions, budget, personnel, labor negotiations and collective bargaining agreements, facilities, and other education-related matters." D.C. Code § 38-172 (a) (emphasis added). Where, as here, there is no basis to support Plaintiffs' claims of discrimination or lack of notice, the Court must avoid involving itself in the decisions of District policy-makers as to how best to distribute limited educational resources. *See District of Columbia v. Sierra Club*, 670 A.2d 354, 365 (D.C. 1996) (noting the need for "judicial restraint" so the court would not be in a position to "second-guess the executive branch as to which mandated programs should be accorded priority when not all of them can be accommodated.")*; see also Quattlebaum v. Barry*, 671 A.2d 881, 884 (D.C. 1995) ("Especially in times of budgetary crisis, there are many competing claims on the District's limited financial resources. The Council cannot accommodate them all. Hard and painful choices must be made. The constitutional responsibility to make such choices falls upon our elected officials. They, and not the courts, are obliged "to reconcile the demands of . . . needy citizens with the finite resources available to meet those demands."), quoting *Dandridge v. Williams*, 397 U.S. 471, 472 (1970).

As explained above, Plaintiffs' only alleged basis for a denial of equal protection or a violation of Title VI is disparate impact. [Dkt. # 1-1], at 10-13 and 18; [Dkt. # 1-1], at 18.

To succeed on either of these claims, Plaintiffs must also show that DCPS had the *intent* to discriminate:

> Plaintiffs' § 1983 claims alleging violation of equal protection and Title VI require similar proofs – plaintiffs must show that actions of the defendants had a discriminatory impact, *and that defendants acted with an intent or purpose* to discriminate based upon plaintiffs' membership in a protected class."

See, e.g., *Darensburg v. Metrop. Transp. Comm'n*, 636 F.3d 511, 519 (9th Cir. 2011) (citation omitted) (emphasis supplied).

Even a cursory review of their pleadings reveals that Plaintiffs have pled no express intention to discriminate. *See generally*, [Dkt. # 1-1]. To the extent Plaintiffs attempt to show discriminatory *intent* by showing *disparate impact*, the analysis mirrors the burden-shifting structure for analyzing a typical Title VII employment discrimination claim. *See, e.g.*, *Darensburg*, 636 F.3d at 519. So, even if the disparate impact were enough to show discriminatory intent (which, as explained above, it is not), the District then has the chance to demonstrate a legitimate non-discriminatory purpose for the Consolidation Plan.

The District has already demonstrated that there is a legitimate, non-discriminatory purpose that vitiates any evidence of discriminatory intent based on the documented efficiency and budgetary reasons supporting the Consolidation Plan. *See generally*, Exhibit D. The Consolidation Plan is predicated upon the District's legitimate desire to provide as high quality of public education as possible for all students in the most efficient manner. *Id.* This obvious fact, as well as the complete lack of any evidence of intentional discrimination against any covered class, is plainly fatal to Plaintiffs' disparate impact discrimination arguments.

In light of the absence of any discriminatory intent, and the absence of any legitimate evidence that the "disparate impact" theory creates an inference of such intent, and in light of the obvious legitimate "business" purposes behind the Consolidation Plan, these claims are unlikely to succeed. As such, they cannot support a preliminary injunction.

II. Plaintiffs Will Not Suffer Any Injury, Let Alone Irreparable Injury.

Plaintiffs must show they will suffer *at least some* irreparable injury; otherwise their request for a preliminary injunction fails outright. *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995). "A movant's failure to show any irreparable harm is therefore grounds for refusing to issue a preliminary injunction, even if the other three factors entering the calculus merit such relief." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) *see also, e.g., Sea Containers, Ltd. v. Stena AB*, 890 F.2d 1205, 1210-1211 (D.C. Cir. 1989) (no irreparable harm to enjoin a company to correct allegedly false information in a corporate disclosure where the existence of the suit itself and the allegations of the complaint gave notice to shareholders that the information could be false).

Further, the standard to show *irreparable* injury is high. *Id.* The injury "must be both certain and great; it must be actual, not theoretical." *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curium). This means that the injury complained of must be both 1) imminent and 2) incapable of remediation. *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297. In order for the injury to be imminent, there must be a "clear and present" need for equitable relief. *Id.* (quotations and citations omitted). For an injury to be incapable of remediation there must be no "adequate compensatory or corrective relief [that] will be available at a later date." *Id.* at 297-298, quoting *Wisc. Gas Co.*, 758 F.2d at 674 (other citations omitted).

Even the most charitable conception of Plaintiffs' claims does not meet this high standard. First, it should be noted that the only effect of the proposed closings on the Plaintiffs is that students who are currently educated at DCPS, will continue to be educated at DCPS, *in a different location*.[19] [Dkt. # 1-1], at 33. But Plaintiffs have offered nothing to indicate that this *change* will actually cause them any *harm*, let alone that the harm is irreparable. The most they offer are affidavits speculating that: 1) the affiant is "not sure what would . . . happen[ ]" if her child had an altercation with other children in an unfamiliar neighborhood, (*Id.* at 67) and 2) that when investigating possible bus routes for her disabled daughter to take to her new school the affiant determined only half of the busses on the routes investigated had wheelchair lifts (*Id.* at 71). Contrary to showing the "certain and great" harm required, Plaintiffs' own evidence demonstrates only that their children *will* be able to get to their new schools with only *speculative minor inconvenience*. *See Wisc. Gas Co.*, 758 F.2d at 297. Such a showing cannot support an injunction.

But, even taking the Plaintiffs' broader assertion that the proposed school closings themselves—not the actual effect of those closings on the Plaintiffs—is a harm, Plaintiffs utterly fail to show that it is irreparable. Notably, they offer no evidence that after being closed, the school buildings will be sold, demolished, or otherwise irreparably disposed of by DCPS.[20] They do not even offer any evidence that the favorite teachers mentioned in their various affidavits will not be offered the same or similar positions in the very consolidated schools that their children are

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[19] Plaintiffs also mention as possible harms the D.C. Council voting on a budget, teachers and administrators being fired, and preparations for school closings. [Dkt. # 1-1], at 44. But Plaintiffs are the guardians of students, not teachers, administrators, or other school officers. These events are not harms to the Plaintiffs, no matter how "palatable" they may be. *Id.*

[20] Nor can Plaintiffs argue that this information is in the control of DCPS. Plaintiffs must have a good-faith basis to bring their claims, including allegations of irreparable harm, such as the disposal of school buildings. If they do not have that evidence then their motion must be denied.

scheduled to attend, as is DCPS practice. *See* School Consolidation Staffing Overview, attached as **Exhibit F**. Nor do they offer any evidence that this intangible harm could not be compensated by monetary damages to Plaintiffs at a later date, or by an order that the District obligate the funds "adequate" to actually re-open the schools "at a later date." *See Chaplaincy of Full Gospel Churches*, 454 F.3d at 297-298. Plaintiffs have not, and cannot, show they suffered any irreparable injury, and so their request for a preliminary injunction must be denied. *See CityFed Fin. Corp.*, 58 F.3d at 747.

III. A Restraining Order or Injunction Would Substantially Burden DCPS.

Ordering the District to keep fifteen under-enrolled schools open indefinitely while this matter is resolved would unquestionably burden the operations of DCPS. Exhibit C, ¶¶ 14-21. The District began investing funds into this consolidation more than two years ago, when it first hired ERS. Exhibit A, at 1. The District anticipates that implementing the Consolidation Plan will result in *at least* the shifting of more than 8.5 million in funds between various schools.[21] Exhibit D, at 9. Forcing DCPS to change its plans now would require numerous burdens including: 1) preventing DCPS from notifying other non-Plaintiff students of which school they are assigned to for the 2013-2014 school year; 2) preventing DCPS from assigning teachers among schools to maximize efficiency; 3) stopping DCPS from directing building maintenance funds to where they are most needed for the next school year; 4) hindering DCPS in developing appropriate bus and transportation routes for its students, and notifying students of those routes; 5) essentially preventing DCPS from conducting its operations *by freezing a massive block of schools and funding in some*

[21] Plaintiffs claim that "[a]gainst the backdrop of the District's $417 million surplus" the amount saved by the consolidation plan is minimal. [Dkt. # 1-1], at 45. But comparison with the District's budget is irrelevant, since the question here is the effect on DCPS, whose budget is a mere fraction of the entire District. Similarly, any District surplus does not necessarily benefit DCPS, or any individual District agency.

sort of unalterable judicial stasis. Exhibit C, ¶¶ 14-21. To prevent DCPS from consolidating even the three schools that the Plaintiffs' children attend would be to encumber millions of dollars of DCPS' physical assets, freeze millions of dollars of DCPS' cash flow and affirmatively order DCPS to continue dozens of contracts, relationships and partnerships that would otherwise potentially be dissolved. *Id.*

Even worse, Plaintiffs ask this Court to establish the precedent that a parent who is disappointed that his or her child's school is closing can file a lawsuit and enjoin that action if that school happens to have a higher proportion of African-American students than the District-wide average. This proposition is clearly contrary to law and facially unsupportable as it would effectively require direct judicial supervision of *every school closing* in DCPS. *See National Fed'n of Indep. Bus. v. Sebelius*, ___ U.S. ___, 132 S.Ct. 2566, 2579 (June 28, 2012) (Courts "possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices.") The prejudice to the District and DCPS of granting this injunction is extensive, and clearly outweighs any inconvenience caused to the Plaintiffs' children by going to another school. Entry of an injunction here clearly would be a substantial burden to the District and DCPS.

IV. The Public Interest Favors Allowing District Officials to Continue Running DCPS for the Benefit of All DCPS Students and District Taxpayers.

Plaintiffs' analysis of the public interest is embarrassingly perfunctory, arguing only that "the public interest is best served by ensuring as little disruption as possible to the education process." [Dkt. # 1-1], at 45. But, as explained above, the proposed injunction would disrupt the operations of DCPS on a massive scale. *See also* Exhibit C, ¶¶ 14-21. Plaintiffs, representing the interests of four children, propose to potentially burden the education of *tens of thousands* of other

DCPS students. The public interest here favors allowing the Chancellor and DCPS to continue doing their best to provide quality education for all District residents by implementing the Consolidation Plan. Plaintiffs' narrow interests cannot outweigh the interest of all students in DCPS to obtain a quality education, and so their request for a preliminary injunction should be denied.

DEFENDANTS REQUEST BOND

In the alternative, the District requests that Plaintiffs or their counsel post a bond. This Court may issue injunctive relief only if Plaintiffs post a bond sufficient to pay "the costs and damages sustained" by the District after this Court later determines that the District was wrongfully enjoined. Fed. R. Civ. P. 65(c). The District requests a bond of Seventeen Million, Forty-Three Thousand, Six Hundred Eighteen Dollars ($17,043,618.00). This is twice the estimated first-year direct savings of the Consolidation Plan. *See* Exhibit D, at 9. This is a conservative request both because DCPS' savings from the Consolidation Plan may be greater in subsequent years, and because it does not include the District's costs, which over the course of a two-year litigation would likely be significant.

CONCLUSION

Plaintiffs' disagreement with the Consolidation Plan belongs in the realm of public discourse and local politics, not in federal court under vacuous and "kitchen-sink" civil rights allegations. Plaintiffs cannot show a likelihood of success on the merits, irreparable injury, or that their injury outweighs the extensive prejudice to DCPS and the public at large. For these reasons, a preliminary injunction is inappropriate, and Plaintiffs' motion should be denied.

Respectfully submitted,

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[22] District of Columbia Bar application pending. Member of State Bar of Georgia in good standing. Authorized by the Office of the Attorney General for the District of Columbia to provide legal services pursuant to Rules of the United States District Court for the District of Columbia Local Rule 83.2(f).